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41ST ASSEMBLY DISTRICT

**AB 132: Save Our Local Dealers (SOLD Act)
Testimony by State Representative Joan Ballweg
Assembly Committee on Transportation
May 24, 2011**

Thank you Mr. Chairman for holding a hearing on AB 132. I am happy to be here today on behalf of Wisconsin's 450 franchised new car dealers who employ over 20,000 people in our state. My bill, AB 132, amends Wisconsin's Motor Vehicle Franchise Law, which dates back to 1935. Every state has a dealer franchise law. The law ensures a level playing field, fair competition and treatment between manufacturers and dealers, dealers and dealers as well as dealers and consumers. The law has been amended from time to time to address changes in the industry, marketplace and technology.

I feel a great affinity for Wisconsin's car and truck dealers as my husband and I are in a very similar business, a franchise for farm implements. This helps me understand the unique issues and relationship between the dealer and manufacturer.

Auto and truck dealerships, like my own dealership, are privately owned, independent businesses that are funded 100% by the dealer owner. Dealers must pay for everything out of their own pockets. That means the dealer pays for vehicles, tools, employee training, diagnostic equipment, real estate, building facilities, and computers. In short, a dealership costs the manufacturers nothing in direct operational costs. Dealers are the customer of the manufacturer and their viability and competence in servicing the car buyer is key to the success of the manufacturer as well as the dealer. Most dealership foundations are based on

generations of family investment in the business, community and the relationships those dealers have made with car buyers, their customers.

I don't need to tell anyone here that the automotive marketplace has had a rough few years. We all know that both GM and Chrysler received Millions of Wisconsin taxpayer dollars in recent years to support their now-closed manufacturing facilities in Janesville and Kenosha. And, in December of 2008 GM and Chrysler received Billions of dollars in federal bailout money to help them survive. In mid 2009 they each benefited from a government controlled bankruptcy proceeding wherein they were allowed to off load Billions of more dollars in debt obligations and close factories (including Janesville and Kenosha). The end result was the termination of over 3,500 factory jobs and the termination of over 100 viable dealerships and consequently thousands of dealership jobs in Wisconsin.

Meanwhile, many dealers used their personal savings to pay the bills necessary to meet their financial obligations and none of that bailout money helped dealers who had their franchise pulled. While the economy was tanking and GM and Chrysler were on the brink of going out of business, Wisconsin dealers found a way to stay open, servicing their customers, keeping as many of their employees working as they could and providing their local communities with property and sales tax revenues, jobs and charitable giving.

However, after receiving the benefits of government bailouts and bankruptcy debt relief GM and Chrysler are now strong-arming dealers to invest more of the dealer's personal money into facility modifications and forcing them to surrender business autonomy in exchange for being treated fairly on inventory and customer pricing schedules. Many of these dealers are still paying on notes from previous

dealership modifications that were required and overseen by the manufacturer as recently as three or four years ago.

My bill, AB 132, will restore balance to the manufacturer-dealer relationship in the post-bail out/bankruptcy world and ensure that Wisconsin's dealerships have the tools they need to keep employing 20,000+ people across the state and selling quality vehicles at a fair price to Wisconsin families.

This bill has three main goals:

The first is to **prevent litigation** by clarifying existing grey area provisions in the law regarding *Exclusive Facilities, Mandatory Investments, Warranty Reimbursement and Site Control*.

The second is to **restore a level playing field** by providing Wisconsin dealers with similar franchise protections afforded to dealers in Minnesota, Iowa, Illinois and many other states. It will prevent manufacturers from forcing dealers to incur expenses that have no effect on serving their customers.

Finally, the most important goal is to **save Wisconsin jobs** by preventing arbitrary dealer terminations and unnecessary expenditures by forcing dealers to build new facilities, discontinue offering competing brands or losing repair revenues for warranty work.

We have many experts from the auto dealer community here today who can answer your specific legal and industry questions.

I would appreciate your whole-hearted support of this legislation.

Thank you.

A CRITIQUE OF AB 132:
EXECUTIVE SUMMARY

RICHARD A. EPSTEIN

Assembly Bill 132 proposes to make by legislation major modifications of key elements of the relationship between automobile manufacturers (including distributors and importers) and their dealers. All of the proposed changes will apply to both existing and future contracts. All of these provisions—dealing with such critical issues as site control, investments in dealer improvements, exclusivity and reimbursement rates provide tangible benefits exclusively to dealers at the expense of manufacturers and the public at large. In all cases AB 132 purports to impose by fiat restrictions that have not been negotiated in the market place.

As a general economic matter, it is not possible to identify a particular market failure that these provisions are intended to correct. At bottom their adoption, even if prospective, will tend to reduce overall social welfare as measure by the benefits generated to manufacturers, dealers and consumers.

To make matters worse many of these key provisions are justified by an appeal to a broad notion of “coerce” that has no parallel at common law. Any effort to discriminate among dealers could be regarded as tainted with coercion. The same is said with respect to individual contract provisions, taken out of their business context, that cut against dealers. In effect, this broad account of coercion could pave the way for dealers, after the fact, to set aside any agreements that they make with manufacturers on these provisions.

When these changes are prospective only, manufacturers are in a position to mitigate their losses: they alter other terms of the contract or decline to do business altogether. Those advantages are not available with respect to the legislative modification of existing contracts, which increases the level of wealth transfers that dealers can extract from manufacturers.

The Wisconsin law, most notably in the case of *Wipperfurth v. U-Haul* (1981) has held that this risk of expropriation makes any legislative changes in existing contracts subject to attack under both the Wisconsin and United States Constitutions for an “impairment of contract.” In essence any substantial changes in existing contracts violates the constitution in the absence of some strong reason for its adoption, of which none has been offered here.

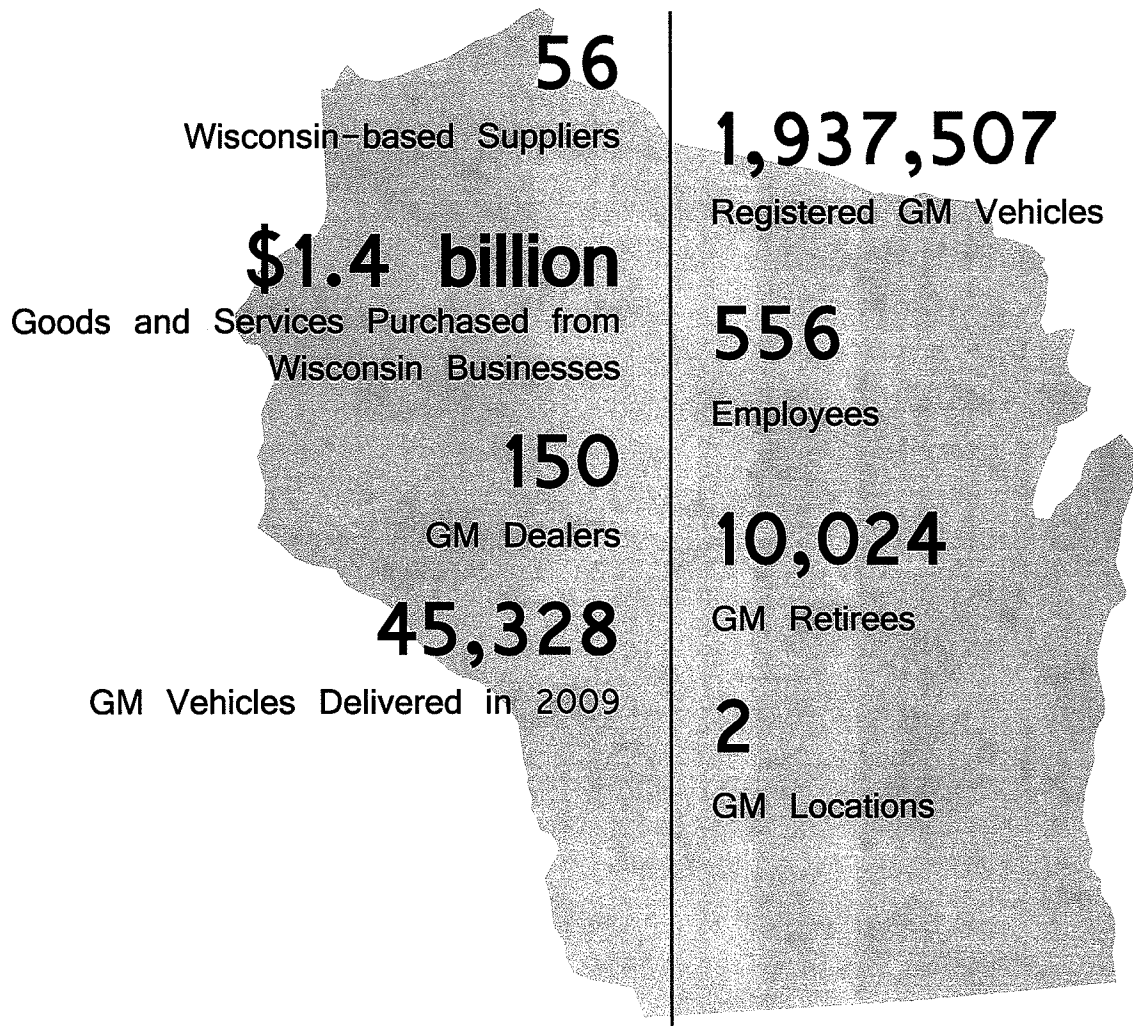
To be sure, the Seventh Circuit decision in *Chrysler v. Kolosso* (1998) looks with greater toleration of preexisting doctrine, but does so in a way that is arguably

inconsistent with much United States Supreme Court authority on the contracts clause and that is flatly inconsistent with *Wipperfurth*.

The key difference between the two approaches is this. *Wipperfurth* well understood that political pressures could exert an untoward influence on legislative behavior and erected a strong barrier against tampering with existing contracts to guard against just that eventuality. *Kolosso* turns that sensible proposition on its head and insists that no person has protection against state manipulation of contracts that it can foresee, which leads to this serious difficulty: The greater the level of abuse by government actors, the greater the constitutional latitude they have to alter existing contracts. That broad position essentially turns both the state and federal constitution upside down.

In light of these arguments, two major changes are needed for AB 132. First, all references to its broad definition of coercion should be removed so as to facilitate private bargaining between manufacturers and dealers. Second, AB 132 should not be applied retroactively to existing contracts.

GM in Wisconsin: The Numbers May Surprise You



Our presence is felt every day in Wisconsin. Last year, we purchased \$1.4 billion of goods and services from Wisconsin businesses, helping to create good-paying jobs in all corners of the state. We are committed to providing our 150 dealers in Wisconsin with great cars and trucks so they can grow their businesses and create more jobs. But our strongest bond with Wisconsinites is rooted in the nearly 2 million GM cars and trucks registered in the state.

Designing, building and selling the world's best vehicles. Creating jobs. Supporting communities where we do business. That's the new GM.





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May 23, 2011

Chairman Petrowski and Members of the Assembly Committee on
Transportation:

Thank you for the opportunity to speak here today. I'm Jeff Perry and I am here today representing General Motors to discuss Assembly Bill 132 and its impact on General Motors, the U.S. automobile industry and all of the businesses in Wisconsin connected to our industry.

On behalf of my GM colleagues, let me begin by expressing our gratitude to our nation's and Wisconsin's taxpayers for their support and the second chance they have given to us and to the U.S. auto industry. With their support, General Motors has come back strong with award winning products; landmark technology innovations; large scale investments in research and development, our plants, and people; as well as strong sales and profitability performance. Performance that allows us to support over 50 Wisconsin based suppliers with approximately \$1.4 billion in purchases of goods and services, and nearly two million vehicle owners in Wisconsin.

In fact, with the help of our dealers, in 2010 GM's four vehicle brands sold more vehicles than were sold through eight GM brands in 2009, dealer profits have nearly doubled and over 90% of our dealers are profitable. And the success has continued in 2011—that's strong testimony for the partnership between GM and its dealers. Unfortunately a disturbing trend is placing a cloud over our progress, our partnerships, and the business environment in Wisconsin.

AB 132 brings us before this legislature to address changes to the motor vehicle franchise law as we did in 2001, 2003, 2006, 2007 and 2009. Each time providing automobile dealers in Wisconsin with significant statutory protections not generally afforded to other independent business owners or residents in the state. AB 132 proposes still more, overreaching legal protections for Wisconsin dealers and places the state in the position of having to pick winners and losers, interfering with private contracts, and pushing constitutional boundaries.

As my colleague from the Alliance of Automobile Manufacturers has explained, despite the overreaching nature of many of the draft proposed amendments prepared by the dealer association, the Alliance of Automobile Manufacturer members were able to come to a consensus with the dealer association on 21 out of 22 issues. The only issue that remained unresolved was a provision that declared all changes in the law to apply to any and all agreements between a manufacturer and dealer regardless of when the agreement was entered into. Unfortunately, the dealer association drew a hard line when the manufacturers would not agree to drop their opposition to this retroactivity provision and consequently retracted all of the agreements to compromise on the other 21

issues. A coercive tactic that is neither productive nor conducive to any negotiation or the development of good policy.

As a matter of principle and good public policy, the automobile manufacturers have remained opposed to the retroactivity provision. Retroactive application of changes in the law means contracts that were freely entered into in the last several years could be wiped away leaving the dealer with the full benefit of the bargain and stripping the manufacturer of the benefits promised. As a result of this interference with private contracts the parties are left with an unpredictable and unstable business environment where the right to contract is left meaningless.

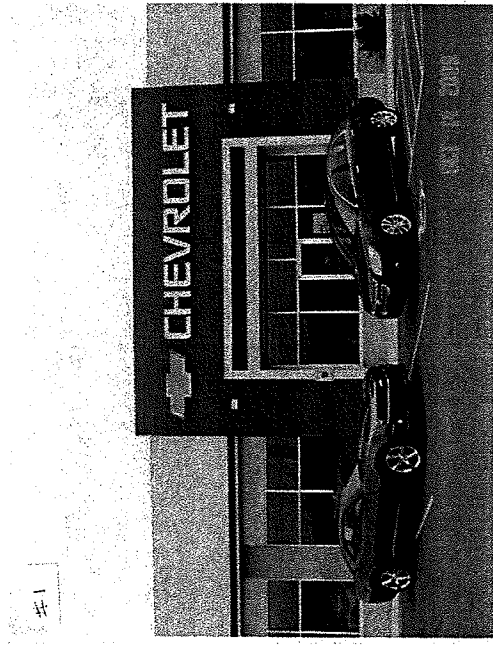
Like most businesses, contractual agreements are the cornerstone of the relationship between manufacturers and dealers. Given the broad sweeping comprehensive changes proposed in AB 132, retroactive application of such changes to existing contractual terms will serve only to weaken the relationship between dealers and manufacturers as dealers would be permitted to walk away from their obligations and commitments while manufacturers are stripped of the benefits promised to them under existing agreements. As drafted, the provisions of AB 132 could have dramatic consequences for many manufacturer/dealer contracts including: property use agreements, facility improvement contracts, relocation agreements and more, unjustly enriching one party at the expense of the other. As a result, the cost of doing business in Wisconsin will increase as manufacturers seek alternative ways to protect against contractual losses and less efficient methods for achieving the same outcomes. Ultimately raising consumer prices and leaving manufacturers to question the viability of future investments in the state of Wisconsin.

General Motors believes that manufacturers and dealers must work together to help create a stronger industry, but the provisions of this bill drive a wedge between us and run counter to a productive partnership. We ask that members of the Committee join us in opposing AB 132.

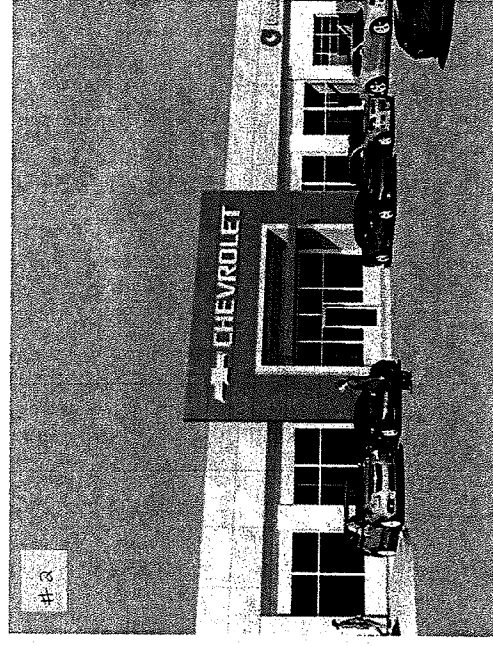
Thank you for your time. I'd be happy to try and answer any questions that you may have.

Protecting Wisconsin Jobs: Save Our Local Dealers (SOLD) Act

What's the big difference?....



....About \$150,000



- A Wisconsin dealership spent \$1.2 million to build a new building that matched the manufacturer's requirements at that time – the building you see on the left.
- Only three years later the manufacturer – fresh off of bankruptcy protection and a taxpayer bailout – is attempting to force the dealership to spend nearly \$150,000 to change the entry way per the rendition you see on the right.
- These kinds of abuses are why we need the SOLD Act to restore balance to the manufacturer-dealer relationship in the post bail-out/bankruptcy world.



Driving Wisconsin's Economy

Annual Contributions of Wisconsin's New-Vehicle Dealers*

Wisconsin's dealers maintain a multi-BILLION dollar retail industry.

Average sales per dealership	\$15.7 million
Total sales of all new-vehicle dealerships in Wisconsin	\$8.6 billion
Dealership sales as % of total retail sales in the state.....	12.8%
Estimated number of new-vehicle dealerships	545

Dealers provide thousands of well-paying jobs in Wisconsin.

Total number of new-vehicle dealership employees in Wisconsin.....	20,771
Average number of employees per dealership	38
Average annual earnings of new-vehicle dealership employees	\$37,234
Dealership payroll as % of total state retail payroll	11.0%
Annual payroll of new-vehicle dealerships.....	\$775 million
Average annual payroll per new-vehicle dealership	\$1.42 million

Dealers generate hundreds of millions of dollars of tax revenue for state and local government through:

- Sales Tax Revenue
- Corporate Tax Revenue
- Payroll Tax Revenue

**Numbers reflect annual economic activity during 2009*

Protecting Wisconsin Jobs: Save Our Local Dealers (SOLD) Act

Restoring Balance in the Post-Bailout/Bankruptcy Marketplace

For nearly 80 years, Wisconsin (and every other state), has had a law on the books that governs the relationship between truck and automobile manufactures and local dealers. These laws are meant to ensure fair treatment of manufacturers by dealers, and vice versa, with the goal of protecting consumers when they make one of their most significant purchases – a new car or truck. Wisconsin's law, the Wisconsin Motor Vehicle Dealer Law (WMVDL), has been updated from time to time to reflect changes in technology, business practices and consumer demands. The SOLD Act is a needed update to restore balance and fairness to the manufacturer-dealer relationship in the post-bailout/bankruptcy world.

Imbalance: While the word coercion is found throughout the WMVDL, it is not defined. This lack of clarity leads to expensive litigation – the cost of which ultimately gets passed on to consumers.

Balance Restored: The SOLD Act provides a common sense definition of “coercion” that will provide a bright line for both dealers and manufacturers.

Imbalance: Often times, entities other than the truck manufacturer provide the engine, transmission and axle components for heavy and medium trucks (commercial vehicles over 16,000 gross vehicle weight). These same third parties issue the warranties covering those components, but, unlike the truck manufacturers, the component manufacturers are not currently covered by the WMVDL. This loophole can make it difficult for a truck dealer to ensure proper compensation for warranty repairs and proper repair authorization when taking care of the vehicle owner's warranty repairs.

Balance Restored: The SOLD Act closes the loophole that allows truck component manufacturers to avoid paying for repairs covered under warranties that apply to their products.

Imbalance: From time to time dealers will want to make changes to their business, like move to a better location, change key management personnel or transfer ownership to the dealer's children. However, in order to get their needed approval for the proposed changes, manufacturers have been requiring dealers to enter into an unrelated site control agreement. Site control agreements give the manufacturers the right to control the current dealership real estate for a period of years (typically 25-30), even after the dealer discontinues the business. One result of this kind of arrangement was a former dealer being stuck with a vacant facility after a manufacturer used a site control agreement to terminate a lease with the entity that purchased the dealership.

Balance Restored: The SOLD Act gives dealers the ability to bargain with the manufacturers for consideration in exchange for approving a site agreement.

Imbalance: Using their newfound leverage from the bailouts and bankruptcy, manufacturers have been forcing dealers to change everything from showroom floor tile to the layout of a waiting room to the dealer's building façade. Often times, the dealer cannot afford to make the change and the impact the move will have on sales is questionable.

Balance Restored: The SOLD Act requires manufacturers to show that reasonable business considerations exist or to provide the dealer with separate and valuable consideration before they can force a dealer into investing their own money into facility changes that are dictated by the manufacturer.

Imbalance: In order to ensure success and create jobs, many dealers will enter into agreements to sell vehicles from multiple manufacturers. However, some manufacturers have been attempting to stop dealers from selling multiple brands.

Balance Restored: The SOLD Act requires manufacturers to prove it is reasonable to require exclusivity while taking into consideration the business needs of both the manufacturer and the dealer.

Imbalance: Manufacturers prohibit domestic dealers from selling vehicles overseas. However, manufacturers are penalizing dealers even when vehicles are purchased from a dealer and then subsequently exported without the dealer's knowledge or consent.

Balance Restored: The SOLD Act prevents manufacturers from charging fees when a vehicle sold by a dealer is exported without the dealer's knowledge or consent.

Imbalance: Manufacturers are charging back dealers, all incentive money for collecting service fees that all other dealer customers must pay, when a manufacturer's employee purchases a vehicle.

Balance Restored: The SOLD Act makes it clear that manufacturer employee purchases are subject to the same service fees as non-employee purchases.

Imbalance: Dealers are being forced by manufacturers to turn over private financial information on customers that is not needed for the manufacturer to meet its obligations to the customer.

Balance Restored: The SOLD Act prohibits a manufacturer from requiring a dealer to share certain types of customer information, but allows the dealer to provide information necessary for the manufacturer to carry out services related to the vehicle or other uses permitted by applicable privacy laws.

Imbalance: Current law requires manufacturers to pay dealers the same price for vehicle repairs covered under warranty as non-warranty cash paying customers are charged. However, manufacturers have designed ways to skirt this requirement which drives up costs for all vehicle repairs.

Balance Restored: The SOLD Act ensures that manufacturers fairly reimburse dealers for repairs covered under a warranty by clarifying the process for determining average customer pay rate. It is important that manufacturers pay the same rate as cash paying customers because the manufacturers require the dealers to buy special tools, diagnostic equipment and software and pay for technician training, all of which costs the dealers tens of thousand of dollars annually.

Imbalance: Unlike many states, Wisconsin's law does not indemnify dealers from lawsuits based on defective or negligent manufacturing of a vehicle. Meaning a dealer could be dragged into a lawsuit based on something it had nothing to do with.

Balance Restored: The SOLD Act clarifies that manufacturers are responsible for any legal claims based on the defective or negligent manufacturing of a vehicle.

Imbalance: Current law requires manufacturers to repurchase new vehicles and other items from terminated dealers. These "benefits" vary depending on whether it was the manufacturer or dealer who initiated the termination. However, the ramifications of mass forced closures and product discontinuations are not considered in current law.

Balance Restored: The SOLD Act updates a manufacturer's financial obligations to reimburse dealers for inventory and other facility and operations investments made at the manufacturer's insistence.

THE HEADLINES TELL THE STORY

PROTECT WISCONSIN JOBS: SUPPORT THE SOLD ACT

WISCONSIN GM PLANT ANNOUNCES MORE LAYOFFS

6/2008 WYBT - La Crosse

HISTORIC GM FACTORY

THAT SURVIV"

DEPRESSION

TO CLOSE

10/2008, Fox News

GM, FORD, CHRYSLER ASK CONGRESS FOR BILLIONS IN HELP

12/2008, USA Today

G.M. PLANS 10,000 TEMPORARY LAYOFFS

10/2004, New York Times

Chrysler to cut 18 state dealerships; GM's ax may fall next

5/2008, Milwaukee Journal

GM, FORD, CHRYSLER ASK CONGRESS FOR BILLIONS IN HELP

GM CLOSING OF OLDEST PLANT IS "KICK IN THE GUT"

6/2008, Reuters

AN ECONOMIC BLOW TO JANESVILLE, WIS.

6/2008, Star Tribune

CHRYSLER TO CLOSE KENOSHA FACTORY IN OCTOBER, CUTTING 575 JOBS,

12/2010, Milwaukee Journal

KENOSHA SAYS GOODBYE TO CHRYSLER,

12/2010, The New Republic

Chrysler Wants To Close 18 Dealerships In Wisconsin

5/2009, WISN

Ford to rely on fewer suppliers

2/2007 Milwaukee Journal Sentinel

GM Dealers Share

Frustrations Over

Closings

5/2009, WQOW

HUNDREDS OF CHRYSLER, DODGE & JEEP DEALERSHIPS CLOSING ACROSS THE COUNTRY

AND IN MILWAUKEE

5/2009, Fox 6

End of the line for Chrysler engine plant in Kenosha

10/2010, Milwaukee Journal

GM ADDING TO LAYOFFS AT JANESVILLE PLANT

6/2008 The Business Journal

Protecting Wisconsin Jobs: Save Our Local Dealers (SOLD) Act

Myths versus Facts

- Myth:** *Automobile and truck manufacturers have a financial stake in the dealerships that sell their new cars and trucks.*
- Fact:** Dealerships are privately owned, independent businesses that are 100 percent funded by the dealer owner. Dealers must pay for everything out of their own pockets including the vehicles on the lot, facilities, employee training and promotional items. Dealerships provide manufacturers with a no-cost distribution chain for their product.
- Myth:** *Dealers don't pay the manufacturer for a vehicle until it is sold.*
- Fact:** Dealers are invoiced for new vehicles when they ship from the plant. That means dealers pay for vehicles before they even have them on their lots and they pay interest on each of them until they are sold, and incur all the risk that a vehicle may sell at a loss or not sell at all.
- Myth:** *The over 100 dealerships that were closed during the bankruptcy proceedings for Chrysler and General Motors were due to poor performance.*
- Fact:** A report from the Special Inspector General found that the push to close dealerships by the government and manufacturers was done for "amorphous reasons." The report also found that the idea that fewer dealers would lead to greater profits for manufacturers was "not-universally-accepted theory."
- Myth:** *Dealers, along with manufacturers, were aided by bankruptcy and government bailouts.*
- Fact:** The opposite is true: not only did the manufacturers use bankruptcy to force closure of over 100 dealerships in Wisconsin alone, but they are using their new status to force dealers to sign new agreements that give even more power to manufactures to force dealerships to make changes the dealer cannot afford. For example, a Wisconsin dealer was given three days to sign a new agreement with General Motors or be subject to closure. These abuses are at the heart of the need to update Wisconsin's motor vehicle dealer law.
- Myth:** *The SOLD Act interferes with contractual negotiations between private parties.*
- Fact:** For nearly 80 years, Wisconsin (and every other state), has had a law on the books that governs the relationship between truck and automobile manufacturers and local dealers. These laws are meant to ensure fair treatment of manufacturers by dealers, and vice versa, with the goal of protecting consumers when they make one of their most significant purchases – a new car or truck. Wisconsin's law, the Wisconsin Motor Vehicle Dealer Law (WMVDL), has been updated from time to time to reflect changes in technology, business practices and consumer demands. The SOLD Act is a needed update to protect consumers and restore balance and fairness to the manufacturer-dealer relationship in the post-bailout/bankruptcy world.